cases is well expressed in Haynes v. Temple,[4] where it is held that payment would not have vested title in the vendee, but that title would have remained in the vendor until the final payment. Suit for payment should have no greater effect than the payment itself. The general rule of election of remedies does not apply here, for there are no inconsistent remedies sought until the entire sum is due.

The principal case is also in accord with the proposed "Act to make Uniform the Law of Conditional Sales".[5] Section 22 of this proposed act contains the provision: ". . . . neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such an action, nor a collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods . . . . but such right of retaking shall not be exercised by the seller after he has collected the entire price. . . ." The rule of the proposed act is as a matter of fact more favorable to the vendor than is the present California rule, since it frankly permits inconsistent remedies.

The contract in the principal case, in common with the majority of contracts of its kind, provided that on fulfillment of the terms of the lease the vendee could purchase for one dollar. Is this dollar the final payment? No case deciding this point was found. It is suggested, however, that the court would undoubtedly look to the substance and not the form, as it does in construing a contract in form a lease as a conditional sale,[6] and would hold this added sum of one dollar to be merely part of the formal subterfuge of the lease. The real condition vesting the title is the payment of the "rent" or installments,[7] and suit for all of the installments would probably be construed to vest the title in the vendee, regardless of the remaining one dollar. *E. M. J.*

TORTS: THE DOCTRINE OF FLETCHER V. RYLANDS IN CALIFORNIA.[1]—*Sutliff v. Sweetwater Water Company*[2] was an action to recover for damage done to plaintiff's land by the breaking of defendant's reservoir during an unprecedented flood of the Sweet-

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L. J. 148, that payment by note of part of the price did not vest the title. But see contra, Eilers Music House v. Douglass (1916) 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E 613, holding that bringing an action to recover amounts already due is an election to treat the sale as absolute, and that it is immaterial that the whole purchase price was not sued for.

[4] Supra, n. 3.

[5] 18 Columbia Law Review, 116.

[6] Lundy Furniture Co. v. White (1900) 128 Cal. 170, 172, 60 Pac. 759, 79 Am. St. Rep. 41. Kelley-Springfield Road Roller Co. v. Schlimme (1908) 220 Pa. 413, 69 Atl. 867; 1 California Law Review, 76; Williston on Sales, § 336.

[7] The practice of some commercial houses in giving a bill of sale immediately on payment of all installments, without requiring the payment of the additional dollar, lends support to this view.

[1] For authorities in other states see notes, 15 L. R. A. (N. S.) 541, 33 L. R. A. (N. S.) 1061; 1 English Ruling Cases, 272.

[2] (Jan. 7, 1920) 59 Cal. Dec. 64.

water River. The plaintiff relied on Fletcher v. Rylands,[3] in which Lord Blackburn lays down the rule that "the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of a *vis major*, or the act of God."

The decision in the Sutliff case rests on two grounds. In the first place it is held that the facts do not bring it within the doctrine of Fletcher v. Rylands, for the dictum that the plaintiff might have been excused had the damage been due to a *vis major* became the rule of Nichols v. Marsland[4] and covers the principal case. It is merely an application of the well-known rules of legal cause: that the chain of causation is broken when an act of God intervenes and it, not the defendant's act, becomes the "proximate cause";[5] nor is the harm a "natural consequence" when it is caused by an extraordinary act of nature.[6]

In the second place, Justice Olney points out that the particular question at issue is settled in this state on a principle other than that enunciated in Fletcher v. Rylands. He then cites many cases in which the owner of ditches and reservoirs is held liable only where his negligence caused the damage. And so the question is presented of how far Fletcher v. Rylands is law in California.

Professor Wigmore's examination of the law led him to the conclusion that, while it is often said that "Fletcher v. Rylands is not law in America or in this or that state", its principle nevertheless is followed consciously or unconsciously by all American courts, but that there is a disagreement as to what set of facts requires its application, and some courts restrict its use more than others. The result of the case is that the classification of acts with reference to responsibility for harm has been changed from the twofold category existing at the time of the Norman conquest; acts of misadventure, and wilful acts; to the threefold category of, first, acts done wilfully; second, acts done at peril, and, third, acts done negligently.[7] If Fletcher v. Rylands only establishes this system of classification it is law in California. If it is regarded as placing the maintenance of ditches and reservoirs as acts within the second class, it is not law in this state.

There are few cases in California in which a person has been held to act at his peril. In one, a case of blasting in a city, Fletcher v. Rylands was cited and followed.[8] The doctrine is also applied to

[3] (1868) L. R. I. Ex. 265, L. R. 3 Eng. & Irish App. 330, 1 Eng. Ruling Cases 235.
[4] (1876) L. R. 2 Ex. 1, 1 Eng. Ruling Cases 263.
[5] 2 Modern American Law, 122-123.
[6] 2 Modern American Law, 125-126.
[7] 7 Harvard Law Review, 454.
[8] Colton v. Underdonk (1886) 69 Cal. 155, 159, 19 Pac. 532, 20 Pac. 610, 3 L. R. A. 754.

cases of keeping vicious animals,[9] and to keeping in the fumes of a gas factory, even though the factory be operated under a municipal ordinance and the best modern appliances used.[10] But Fletcher v. Rylands was not cited in either of these last two cases, and its large rule was not implied therein, for the first case rests upon ancient rules concerning the keeping of wild or of vicious domesticated animals;[11] and relief in the second case was founded on the doctrine of nuisance.

Due to the necessity in this state of the use of artificial ponds and waterways in mining and agriculture, the question of the liability of the owner was raised at an early date. The rule laid down at that time and consistently followed is that a man is liable for the want of such care in the building and maintenance of ditches and reservoirs as an ordinarily (not "a very"[12]) prudent man would exercise if he were the owner of the land below and the risk were all his own.[13] *H. V. D.*

VENDOR AND VENDEE: RISK OF LOSS ON VENDOR: RIGHT OF RESCISSION BY VENDEE: EQUITABLE CONVERSION.—Does the mere signing of a contract for the conveyance of real property shift the burden of the risk of loss to the purchaser? The prevailing rule[1] says yes; the buyer must pay in full for the property even though a fire occurring before the deed is delivered has left naught but ruins. The rule in California, however, holds the contrary, and permits the buyer to rescind the contract if a substantial part of the property has been destroyed. Waiver of this right of rescission is good consideration for the seller's promise to rebuild, according to the case of *LaChance v. Brown*.[2]

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[9] Gooding v. Chutes Co. (1908) 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071.

[10] Judson v. L. A. Suburban Gas Co. (1910) 157 Cal. 168, 106 Pac. 581, 26 L. R. A. (N. S.) 183.

[11] May v. Burdett (1846) 9 Q. B. 101, 115 Eng. Rep. R. 1213; Laverone v. Mangianti (1871) 41 Cal. 138, 10 Am. Rep. 269.

[12] Wolf v. St. Louis Water Co. (1858) 10 Cal. 541, 545.

[13] (a) Cases of damage from the breaking of ditches and reservoirs: Tenney v. Miner's Ditch Co. (1857) 7 Cal. 335; Hoffman v. Tuolumne Water Co. (1858) 10 Cal. 413; Todd v. Cochell (1860) 17 Cal. 98; Everett v. Hydraulic etc. Co. (1863) 23 Cal. 225; Weiderkind v. Tuolumne Water Co. (1884) 65 Cal. 431, 4 Pac. 415; Moore v. San Vincent Water Co. (1917) 175 Cal. 212, 165 Pac. 687; Bacon v. Kearney Vineyard Syndicate (1905) 1 Cal. App. 275, 82 Pac. 841; Stapp v. Madera Canal & Irr. Co. (1917) 34 Cal. App. 41, 49, 166 Pac. 1017.

(b) Damage from overflow or leakage of ditches and ponds in cases where there was no breaking: Campbell v. Bear River etc. Co. (1865) 35 Cal. 679; Parker v. Larsen (1890) 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30 (there is no specific mention of negligence here, but it is found that the harm could have been averted with a little expense and trouble); Chidester v. Consolidated Ditch Co. (1881) 59 Cal. 197, 202.

[1] Paine v. Meller (1801) 6 Ves. Jr. 349, 31 Eng. Rep. R. 1088, is the leading English case and it has been followed in most of the courts of the United States. See 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 5067. Also Clark on Equity, pp. 156-160.

[2] (June 9, 1919) 28 Cal. App. Dec. 1350, 183 Pac. 216.